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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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10/797,981

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Dennis Eugene Kuhlman

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EXAMINER

MAHYERA, TRISTAN J

ART UNIT

PAPER NUMBER

1615

MAIL DATE

DELIVERY MODE

12/19/2008

PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary	Application No. 10/797,981	Applicant(s) KUHLMAN ET AL.	
	Examiner TRISTAN J. MAHYERA	Art Unit 1615	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 18 June 2008.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-6,9 and 15-19 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-6,9 and 15-19 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. _____.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413) |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____ |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08) | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____ |

DETAILED ACTION

Status of the Claims

Claims 1-6, 9 and 15-19 are pending. Claims 7, 8 and 10-14 have been cancelled. Claim 6 has been amended. Claims 1-6, 9 and 15-19 are examined on the merits.

Specification

The objection to the disclosure because of trademark informalities has been **withdrawn** in view of the amendments.

Claim Objections

The objection of Claims 7 and 10 under 37 CFR 1.75(c), as being of improper dependent form for failing to further limit the subject matter of a previous claim is hereby **withdrawn** because Claims 7 and 10 have been cancelled.

Claim Rejections - 35 USC § 112

The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

The rejection of Claims 6, 8 and 10 under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention is hereby **withdrawn** in light of the claim 6 amendment and the cancelling of claims 8 and 10.

Applicants' arguments and Declaration under 37 CFR 1.132

Applicants have traversed all prior art rejections and filed a declaration signed by Timothy Coffindaffer on June 17, 2008. The declaration under 37 CFR 1.132 is insufficient to overcome the rejections of claims 1-6, 9 and 15-19 based upon 35 USC 102(b) and 35 USC 103(a) as set forth in the last Office Action dated 3/27/2008.

Applicants argue and support with the declaration that the surfactants in DATE are not lathering surfactants. DATE teaches the use of ARLATONE 2121, which Mr. Coffindaffer states are used to emulsify oils and set up liquid crystalline systems. ARLATONE 2121 is simply a mixture of sucrose cocoate and sorbitan stearate. Sucrose cocoate is a well known lathering surfactant as evidenced by e.g. U.S. Patent 5,972,361 in claim 1 that states "...**nonionic lathering surfactants** selected from the group consisting of lauramine oxide, cocoamine oxide, decyl polyglucose, lauryl polyglucose, **sucrose cocoate**...". Sorbitan stearate, the second component of ARLATONE 2121 is typically used as a emollient, although it is known in the art to be used in high lathering compositions as evidenced by U.S. Patent 6,383,997. The patent teaches that the exact levels of emollient, will depend upon the material chosen with consideration being given to the effects upon lathering and lathering of the composition. Emollients in skin and personal care are materials, which are used to replace or add to lipids and natural oils in the skin or hair. This is consistent with the concept in Mr. Coffindaffer's declaration and the argument that a moisturizer/conditioner containing such an emollient would reduce the lather, however, the Examiner is opposed to the

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repeated statement that this would completely render a "...lathering surfactant system non-lathering." or that one of skill in the art would never combine leave-on lotion technology, as in the DATE reference with a lathering surfactant system. This is counter to numerous commercial products that combine such a moisturizer with a lathering cleanser, albeit many times at a loss in lather. For example, U.S. Patent 5,308,526 teaches personal cleansing liquid products, especially personal cleansers and creams for bath or shower which are formulated for mildness, viscosity control, phase stability, and moisturization. The patent states "[t]here is a clear need for a single product which is capable of delivering both mild skin cleansing and a skin conditioning benefit." See col. 1 lines 28-31. The Examiner believes that the disagreement may rest with the degree of lathering or amount of lathering the product achieves, however, the invention as claimed in e.g. claim 1 is the same as the prior art. Claim 15, not claim 1 defines the Average Lather Volume and in that case the addition of the lathering anionic surfactants and zwitterionic lathering surfactants in FAIR would give such a lather volume. In this case, the 102 rejection stands because every element is present, i.e. the lathering surfactant is sucrose cocoate. This reasoning is further used in the 103 arguments and again rejections stand.

Applicants further argue in the remarks and the declaration that the action does not articulate any finding that the ordinary skilled artisan could have combined the elements, as claimed, by known methods and in that combination each element merely performs that same function as it does separately. Specifically that the copolymer of NOVEON would perform the same function in DATE, i.e. thickening. This is not found

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persuasive because the NOVEON reference specifically states that CARBOPOL AQUA SF-1 is a thickener for **nonionic surfactants**, of which **sucrose cocoate** is a member, as shown above. The NOVEON reference uses a thickener in combination with other compounds and still retains its thickening affect on nonionic surfactants, which is the same concept in the combination of the references, i.e. the addition of CARBOPOL AQUA SF-1 as a thickener to DATE would still act on sucrose cocoate even if other compounds were present because the SF-1 was demonstrated to work in the NOVEON composition.

Furthermore, the NOVOEN reference is not used to directly incorporate the yield value of between 30-50 dyne/cm² blindly, but with the knowledge of one skilled in the art who would realize that a higher value might be necessary when in combination with DATE, which is typical of a reasonable amount of experimentation since the only difference would be the amount of CARBOPOL AQUA SF-1 used, merely a difference in degree. It is noted that Claim 1 has no lower limit on the yield amount, which is only found in dependent claim 19. It is the position of the Examiner that it would have been obvious to one of ordinary skill in the art at the time the invention was made to determine suitable yield values through routine or manipulative experimentation to obtain the best possible results, as these are variable parameters attainable within the art.

Moreover, generally, differences in concentration will not support the patentability of subject matter encompassed by the prior art unless there is evidence indicating such concentration is critical. "[W]here the general conditions of a claim are disclosed in the

prior art, it is not inventive to discover the optimum or workable ranges by routine experimentation.” *In re Aller*, 220 F.2d 454, 456; 105 USPQ 233, 235 (CCPA 1955).

Applicants argue in the remarks and declaration that the physical state of composition in the reference precludes the combination. Mr. Coffindaffer states that when the physical states of the systems are different, the mechanisms for thickening and suspension are different and thus no expectation of success. This is not shown to be the case because as discussed above, the combination of CARBOPOL AQUA SF-1, although in a micelle state with DATE would still act as a thickener because again NOVEON teaches that SF-1 will specifically thicken a product with nonionic surfactants of which sucrose cocoate is a member. This is independent of the physical state of the products in the references, but a relationship between the compounds specifically taught. It is believed that this would give both a strong motivation to combine and lead to a likely expectation of success.

Applicants state that MCKELVEY does teach the use of ethoxylated polymers, but does not teach the use of water soluble surfactants or lathering compositions. When taken as a whole, both DATE and MCKELVEY teach lathering compositions with nonionic surfactants and ethoxylated polymers. DATE as discussed *supra* teaches the use of lathering surfactants, specifically sucrose cocoate, thus a prima facie case of obviousness was set forth.

Applicants argue that a reason to combine DATE and MCKELVEY was not identified by the Examiner, however, the Office Action dated 3/27/2008 clearly states that the polymers are being used to thicken hair care composition (see p8). The fact

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that these are gel systems does not take away from the properties of the polymers, nor would it preclude compounds used in one physical state to be used in a composition of another physical state, as was shown above. Furthermore, a reasonable expectation of success between DATE and MCKELVEY exists because the thickeners of MCKELVEY would perform as thickeners in both the stated gel systems of DATE and MCKELVEY.

Applicants argue that DATE and FAIR taken as a whole do not set forth a prima facie case for obviousness. This is not found persuasive because the Office Action dated 3/27/2008 states the increased cleaning benefits from greater lather by using a combination of anionic and amphoteric/zwitterionic surfactants as taught by FAIR. Furthermore, the fact that embodiments of FAIR are directed to a solid soap bar does not preclude a person skilled in the art from combining the reference. The references were combined in order to increase the lathering, which is independent of the physical state of the composition, thus there exists a strong motivation and expectation of success when known lathering surfactants from FAIR are used in combination with DATE, which already has a nonionic lathering surfactant.

Applicants' arguments are believed to have been addressed in full and both the 102 and 103 rejections stand.

Claim Rejections - 35 USC § 102

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

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(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claims 1-3, 5 and 19 **remain** rejected under 35 U.S.C. 102(b) as being anticipated by DATE et al. (US 5,674,509 see PTO-1449).

DATE teaches a skin care composition. The reference teaches a composition comprising steareth-100, a mono-alkyl substituted alkyl ethoxylated polymer having more than 40 moles of ethylene oxide. See e.g. Example 1; instant claims 1-3 and 5. The steareth-100 is taught at 0.1%(Examples 1-2 and 6-7) and 0.15%(Examples 3-5 and 8-10). The composition includes CARBOPOL 1342 and 951, cross linked copolymers, at 0.185% combined. See e.g. Example 1; instant claim 1. The particulate material is e.g. dimethicone at 3.3%. See e.g. Example 1; instant claim 1. The lathering surfactant is ARLATONE 2121(sucrose cocoate and sorbitan stearate) in Example 1 at 6%. See e.g. Example 1; instant claim 1.

The reference is silent with respect to a BYV greater than about 50 dyn/cm sq. Applicants' composition, as claimed, is the same as the prior art. As claimed, Applicants' composition contains the same components in the same configuration as the prior art. Properties are the same when the structure and composition are the same. Thus, burden shifts to applicant to show unexpected results, by declaration or otherwise. *In re Fitzgerald*, 205 USPQ 594. In the alternative, the claimed properties would have been present once the composition was employed in its intended use. *In re Best*, 195 USPQ 433; instant claim 19.

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

This application currently names joint inventors. In considering patentability of the claims under 35 U.S.C. 103(a), the examiner presumes that the subject matter of the various claims was commonly owned at the time any inventions covered therein were made absent any evidence to the contrary. Applicant is advised of the obligation under 37 CFR 1.56 to point out the inventor and invention dates of each claim that was not commonly owned at the time a later invention was made in order for the examiner to consider the applicability of 35 U.S.C. 103(c) and potential 35 U.S.C. 102(e), (f) or (g) prior art under 35 U.S.C. 103(a).

Claims 1 and 9 **remain** rejected under 35 U.S.C. 103(a) as being unpatentable over DATE et al. (US 5,674,509 see PTO-1449) in view of NOVEON (CASF1-021

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“Carbopol Aqua SF-1 Polymer” Dec. 2000 edition) evidenced by PATEL (US 6,846,785 see PTO-892).

DATE teaches a skin care composition, as described above.

DATE does not teach the use of the specific alkali swellable acrylate copolymer.

NOVEON teaches the copolymer CARBOPOL AQUA SF-1 for use in clear baby shampoo formulations. The weight % of SF-1 is 5.0%. See e.g. page 1; instant claims 1 and 9. The reference teaches that SF-1 is useful to thicken nonionic surfactants, stabilize suspensions, retain clean formulations and enhance pearlescent formulations. See e.g. page 1 and page 2 last paragraph. The BYV (dyne/cm sq) of the formulation is about 30-50. See e.g. properties page 2.

PATEL teaches that CARBOPOL AQUA SF-1 is alkali swellable. See e.g. col 4 line 59 to col 5 line 6.

It would have been obvious to a person of ordinary skill in the art at the time the invention was made to make a cleaning composition comprising alkali swellable cross linked copolymers, as taught by DATE in view of NOVEON. One of ordinary skill in the art at the time the invention was made would have been motivated to combine these elements into a single composition because of the beneficial effects of CARBOPOL AQUA SF-1 in cleaning compositions as taught by NOVEON. Absent any evidence to the contrary, and based upon the teachings of the prior art, there would have been a reasonable expectation of success in practicing the instantly claimed invention.

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Claims 1, 4 and 6 **remain** rejected under 35 U.S.C. 103(a) as being unpatentable over DATE in view of MCKELVEY et al. (US 6,589,517 see PTO-892 dated 9/28/2007).

DATE teaches skin care compositions, as described above. Note that the teaching of DATE reads on claim 6.

DATE does not exemplify di or tri substituted alkyl ethoxylated polymers.

MCKELVEY teaches hair care compositions. MCKELVEY teaches the use of alkyl ethoxylates that may be branched, linear, saturated or unsaturated. See e.g. col 13 line 44 to col 45 line 18. The named di- tri- and tetra- alkyl substituted ethoxylated polymers are GLUCAMATE 120, CROTHIX, PEG-75 dioleate, PEG 120 methyl glucoside dioleate and PEG 150 distearate. See e.g. col 4 lines 53-63; instant claim 4. MCKELVEY teaches that these polymers are beneficial as thickeners in hair care compositions.

It would have been obvious to a person of ordinary skill in the art at the time the invention was made to make a cleaning composition comprising di- and tri-alkyl substituted ethoxylated polymers, as taught by DATE in view of MCKELVEY. One of ordinary skill in the art at the time the invention was made would have been motivated to combine these elements into a single composition because MCKELVEY is in the hair composition art and exemplifies that any of the mono- di- or tri- alkyl substituted ethoxylated polymers are beneficial as thickeners in hair compositions. Absent any evidence to the contrary, and based upon the teachings of the prior art, there would have been a reasonable expectation of success in practicing the instantly claimed invention.

Claims 1 and 15-18 **remain** rejected under 35 U.S.C. 103(a) as being unpatentable over DATE in view of FAIR et al. (US 5,869,441 see PTO-892).

DATE teaches skin compositions, as described above.

DATE does not exemplify the lather volume of the composition or the ratio of anionic surfactants to amphoteric/zwitterionic surfactants from about 1.5:1 to about 1:3.

FAIR teaches compositions that increase the lather through the use of anionic and zwitterionic lathering surfactants. The anionic surfactants are sulfonates and isethionates. See e.g. col 5 lines 5-11 and col 6 lines 6-16; instant claim 18. The ratio of anionic to zwitterionic lathering surfactants can be calculated from claim 1 wherein the anionic surfactant is present from 1-40% and the amphoteric/zwitterionic surfactant is present from 1-20%. See e.g. claim 1; instant claim 17. The lather volume is dependant on the presence of the anionic surfactant and the amphoteric/zwitterionic surfactants which can be balanced and adjusted depending on the other components and lathering volumes of over 200 ml can be achieved. See e.g. table 4; instant claim 15. While FAIR does not explicitly teach all the instant claimed ratios, it is the position of the Examiner that it would have been obvious to one of ordinary skill in the art at the time the invention was made to determine suitable ratios of anionic and amphoteric/zwitterionic surfactants through routine or manipulative experimentation to obtain the best possible results, as these are variable parameters attainable within the art. Moreover, generally, differences in concentration, such as the ratio between the surfactants will not support the patentability of subject matter encompassed by the prior

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art unless there is evidence indicating such concentration is critical. “[W]here the general conditions of a claim are disclosed in the prior art, it is not inventive to discover the optimum or workable ranges by routine experimentation.” *In re Aller*, 220 F.2d 454, 456; 105 USPQ 233, 235 (CCPA 1955). Applicants have not demonstrated any unexpected or unusual results, which accrue from the instant percentage ranges.

It would have been obvious to a person of ordinary skill in the art at the time the invention was made to make a foaming cleaning composition comprising anionic and amphoteric/zwitterionic lathering surfactants, as taught by DATE in view of FAIR. One of ordinary skill in the art at the time the invention was made would have been motivated to combine these elements into a single composition because of the benefits of increasing the lather in a skin cleaning composition by using a combination of both anionic and amphoteric/zwitterionic surfactants as taught by FAIR. Absent any evidence to the contrary, and based upon the teachings of the prior art, there would have been a reasonable expectation of success in practicing the instantly claimed invention.

Conclusion

THIS ACTION IS MADE FINAL. Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a). No Claims are allowed.

A shortened statutory period for reply to this final action is set to expire **THREE MONTHS** from the mailing date of this action. In the event a first reply is filed within **TWO MONTHS** of the mailing date of this final action and the advisory action is not mailed until after the end of the **THREE-MONTH** shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than **SIX MONTHS** from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to **TRISTAN J. MAHYERA** whose telephone number is 571-270-1562. The examiner can normally be reached on Monday through Friday 9am-7pm EST.

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If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, MICHAEL P. WOODWARD can be reached on 571-272-8373. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/Tristan J Mahyera/
Examiner, Art Unit 1615

/MP WOODWARD/
Supervisory Patent Examiner, Art Unit 1615